UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-CV-11344-RGS

STEVEN BALSAVICH

v.

MICHAEL MAHONEY, et al.

MEMORANDUM AND ORDER
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

July 6, 2004

STEARNS, D.J.

On July 10, 2003, Steven Balsavich, a state prison inmate at MCI-Cedar Junction, brought this Complaint against the Commissioner of the Department of Correction, the Deputy Commissioner, a corrections officer at MCI-Cedar Junction, and a MCI-Cedar Junction hearing officer. Balsavich alleges that he was falsely accused of smuggling heroin into the institution in retaliation for having engaged "in constitutionally protected activity, including the filing of a prior civil rights action." He further alleges that his rights to due process were violated during a prison disciplinary hearing held on March 4, 2003. On January 22, 2004, the court denied Balsavich's motion for a preliminary injunction and, pursuant to Fed. R. Civ. P. 56(c), converted the defendants' motion to dismiss into a motion for summary judgment. Balsavich has since filed an opposition to the motion with affidavits from other inmates ostensibly supporting his claims.

The undisputed facts are these. On September 23, 2002, Balsavich was removed from the prison's general population and placed in the segregation unit. On November 13,

2002, he was issued a Disciplinary Report charging him with several offenses. It stated:

> [o]n September 23, 2002 at approximately 10:45 a.m. the institution mail officer received a suspicious letter from the US Mail addressed to inmate Timothy Dykens. This letter contained what appeared to be a magic marker colored kids drawing, which to the touch was extremely powdery and chalky. A sample of this drawing field tested positive for the presence of heroin and further testing by the Massachusetts State Police Crime Lab found the paper to contain a residue of heroin, a Class A controlled substance defined under Chapter 94C, section31 of the General Laws.
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> Informant information revealed that inmate Steven Balsavich conspired with someone on the street to have this heroin mailed into MCI-Cedar Junction. It was also revealed that Steven Balsavich conspired with inmate Timothy Dykens to have drugs mailed into this institution under Dykens' name to divert suspicion from himself. This evidence is being held in the institution drug locker for evidence purposes. All proper authorities were notified.

Balsavich was then notified that a hearing was scheduled for December 4, 2002. In response, Balsavich completed a "Request for Representation and/or Witness" form asking that he be provided with the evidence against him, including informant statements, that the proceeding be taped, that Dykens and the "Reporting Staff Person," David Brien, be present, and that he be represented at the hearing by attorney Isaiah Shalom. On November 18, 2002, attorney Shalom wrote to David Brien as follows.

> Please be advised that I am representing the above Mr. Balsavich with regard to the above D-Report. I request that either you or the person who is in charge of this matter inform me of the time of the hearing that is scheduled for December 4 (I have no problem with that date) and that it be scheduled to take place no earlier than 10:30 a.m. nor later than 2:30 p.m., and not until I arrive and have been processed. I further request that this hearing be tape-recorded and that you provide me with copies of all documents that you intend to present as evidence in the hearing. Finally, I request that you forward this letter, with these requests to the person responsible, if it is not yourself; your name is the only name that is legible on the D-ticket.

According to Balsavich, attorney Shalom contacted disciplinary authorities the day

before the hearing objecting to the fact that the evidence to be presented against Balsavich had not been disclosed. Attorney Shalom was told that the hearing had been continued and had yet to be rescheduled. On February 13, 2003, after several inquires, Balsavich was notified that the hearing had been reset for February 27, 2003.[1] On February 24, 2003, Balsavich complained in writing that neither he nor attorney Shalom had received any discovery and requested a continuance. On February 25, 2003, Balsavich was notified that the hearing had been continued to March 4, 2003. On February 27, 2003, Balsavich was given the discovery that he had requested with the exception of the informant statements, which were "to be revealed at the hearing."[2]

On March 4, 2003, the hearing was convened. Balsavich objected to the hearing, claiming that attorney Shalom, who was not present, had requested a continuance by letter. After confirming that no letter had been received, the hearing office proceeded with the hearing.[3] Brien testified that the day before Dykens had received the heroin-impregnated letter, an informant had told him that Balsavich was expecting a package containing "dope" that would be sent in Dykens' name. Dykens would then be paid by

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[1]On Balsavich's Request for Representation form there are notations that a "legal cont[inuance was] granted" and another that "No Atty called." These notations are initialed by hearing officer Donna Rizzo, but it is unclear when they were made.

[2]Balsavich's request for "any and all electronic documents or otherwise" pursuant to "videophone Rule 34 of Mass[achusetts] Rules of Procedure" was also denied as being vague. Presumably, the reference is to Mass. R. Civ. P. 34, which governs requests for the production of documents and things.

[3]Balsavich has not produced a copy of the purported letter nor has he specifically disputed the hearing officer's determination that no request for a continuance was ever received from attorney Shalom.

Balsavich by means of a deposit to Dykens' prison account. On September 23, 2002, the mail officer field-tested a drawing sent to Dykens by a supposed relative. The drawing (which tested positive for heroin) was accompanied by a note from "Andy Dykens," which stated that he had visited Dykens' children and that "Rudy" had drawn the picture for Dykens. An investigation disclosed that Dykens had no children, that "Andy Dykens" was a nonexistent person, and that the return address on the envelope was fictitious. Brien further stated that in addition to the original informant, four other informants (who did not know that the drawing had been received or confiscated) stated that Balsavich was expecting a package in Dykens' name that would contain liquified "dope" in the guise of a "kid's drawing."[4] Dykens and Balsavich testified at the hearing, professing their innocence.

On March 18, 2003, the hearing officer issued a written opinion finding Balsavich guilty of conspiring with Dykens and unknown individuals on the outside to smuggle heroin into the prison. The hearing officer credited Brien's testimony and his circumstantiation of the informants' credibility. In particular, she pointed to the fact that one of the informants had reported that Balsavich and Dykens were expecting the letter before it was received at the prison and that the informants' statements were mutually corroborating. She recommended that Balsavich be confined in the Disciplinary Unit for twelve months, with credit for the six months that he had already served.

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[4]Brien also submitted an "Informant Information Checklist" for each informant stating how many times in the past he had used that informant, the informant's record for reliability, and verifying that each informant was either an eyewitness to events or had personal knowledge of the matters reported.

DISCUSSION

Balsavich argues that his due process rights were violated because "I did not receive a fair hearing on the charges, a written statement of the evidence behind a decision and the reasons for the punishment imposed, a right to call witnesses and present documentary evidence, and assistance of counsel." Balsavich also complains that he did not receive the informant statements prior to the hearing, that the hearing was not timely convened, and that he was held in the segregation unit from September 23 until November 13, 2002, without formal notice of the charges.

The Due Process Clause will not in most circumstances confer on an inmate a liberty interest in freedom from disciplinary procedures and heightened conditions of confinement. Sandin v. Conner, 515 U.S. 472, 486 (1995). While States "may under certain circumstances create liberty interests which are protected by the Due Process Clause . . . these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id. at 483-484. In Sandin, the inmate objected to a disciplinary hearing on charges of misconduct at which he was not permitted to call witnesses and which resulted in a thirty day sentence to a segregation unit. Because the Court concluded that the punishment imposed did "not present a dramatic departure from the basic conditions of [the inmate's] indeterminate sentence," the procedural guarantees of Wolff v. McDonnell, 418 U.S. 539 (1974), were

not implicated. Sandin, 515 U.S. at 485-486.[5] See also McGuiness v. Dubois, 75 F.3d 794, 797 n.3 (1st Cir. 1996).

Prior to Sandin, and influenced by Hewitt v. Helms, 459 U.S. 460 (1983), a number of courts had found a liberty interest created by mandatory language in state statutes and prison regulations that arguably gave rise to enforceable expectations on a prisoner's part with respect to his conditions of confinement. See, e.g., O'Malley v. Sheriff of Worcester County, 415 Mass. 132, 137-138 (1983). Since Sandin, however, "the right to litigate disciplinary confinements has become vanishingly small." Wagner v. Hanks, 128 F.3d 1173, 1175 (7th Cir. 1997). To the extent that such suits remain viable, it appears so only where the confinement is so extreme as to alter the fundamental terms of an inmate's sentence, or where the procedures employed are so blazingly arbitrary and unfair as to amount to cruel and unusual punishment. See Miller v. Selsky, 111 F.3d 7, 9 (2d Cir. 1997).

If Massachusetts prison regulations might be thought to create a liberty interest in avoiding segregated confinement, it is to these regulations and not the Due Process Clause that Balsavich must look. But see Puleio v. Commissioner of Correction, 52 Mass. App. Ct. 302, 306-307 (2001). As a preliminary matter, several of Balsavich's procedural complaints are not supported by the record. Balsavich was permitted to call the witnesses

[5]As the Court noted, there are state actions, like forced transfer to a mental institution or the involuntary administration of psychotropic drugs that are so "qualitatively different" from the characteristic punishment of a person convicted of a crime that the Due Process Clause would directly confer a liberty interest. Sandin, 515 U.S. at 479 n.4. A prisoner may also seek protection under the First and Eighth Amendments and the Equal Protection Clause from arbitrary state action "even within the expected conditions of confinement." Id. at 487 n.11.

that he identified on the "Request for Representation and/or Witness" form and was not precluded from calling additional witnesses. See 103 CMR § 430.14(4)(a) (qualified right of prisoner to call witnesses). If the objection is to the fact that the informants were not called as witnesses, the decision to keep their identities confidential was justified by reason of institutional safety and common sense. Wolff, 418 U.S. at 566. Despite Balsavich's assertion to the contrary, the hearing officer explained in a written statement her findings, her recommended punishment, and the reasons for her recommendation. Finally, there is no indication in the record that Balsavich was denied the opportunity to present documentary evidence.

While a delay occurred between Balsavich's transfer to the segregation unit and his receipt of the written charge, as well as between the initial scheduling of his hearing and its ultimate convening, Balsavich concedes that after November 18, 2002, he was aware of the particulars of the smuggling charge and that at least some of the delay in the scheduling of the hearing was caused by his and attorney Shalom's requests for discovery. Nor does Balsavich point to any State-created liberty interest, by way of law or regulation, in the speedy trial of a prison disciplinary charge.[6]

The same is true of Balsavich's argument regarding the denial of legal representation. Balsavich does not dispute that he received notice of the March 4, 2003 hearing on February 25, 2003. Pursuant to 103 CMR § 430.11(2), a prisoner need receive only twenty-four hours notice of a disciplinary hearing. Although Massachusetts prison

[6]The six months that Balsavich spent in the segregation unit awaiting the hearing were credited against the twelve months sentence that he received.

regulations permit a prisoner to obtain legal representation, the responsibility for contacting an attorney and ensuring his presence rests with the prisoner.[7] 103 CMR § 430.12. There is nothing in the record to indicate that attorney Shalom requested a continuance, but even if such a request had been made, it was within the discretion of the hearing officer to deny it. See 103 CMR § 430.12(1) ("A [legal] representative may request a continuance but the Department of Correction shall be under no obligation to schedule a hearing in accordance with the scheduling requirements of a representative.").[8]

Finally, Balsavich maintains that the disciplinary charge was concocted by prison officials in retaliation for his having previously filed a civil rights complaint.[9] Balsavich does not identify the complaint or indicate whether it involved any of the present defendants. Rather, he offers three affidavits from fellow prisoners, two of which state that there was "bad blood" between Dykens and Richard Mederios, a block officer, while the

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[7]There is no Sixth Amendment right to counsel at the hearing. Baxter v. Palmigiano, 425 U.S. 308, 315 (1976).

[8]Balsavich claims that because there is a dispute of fact as to whether he was guilty of the underlying infraction, summary judgment cannot enter. He argues that his guilt was not established by a preponderance of the evidence as required by 103 CMR § 430.16(1). For example, he contends that there is no evidence linking him to the Dykens letter other than the informant hearsay, and that the hearing officer erred in crediting the hearsay in making her determination of guilt. Balsavich in this respect confuses his federal lawsuit brought under 42 U.S.C. § 1983, alleging a denial of due process, with a certiorari review of the hearing officer's decision by a state court under G.L. c. 249, § 4. Other than in the instance of habeas corpus, this court has no power to correct alleged errors in a state adjudicatory proceeding. Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923); D.C. Ct. of App. v. Feldman, 460 U.S. 462, 482 (1983).

[9]Because an allegation of confinement for reasons of litigiousness raises a First Amendment claim of denial of access to the courts, it would not be foreclosed by Sandin's due process analysis. Allah v. Seiverling, 229 F.3d 220, 224 (3d Cir. 2000).

third inmate states that he was asked by a corrections officer to blame Dykens for contraband "metal" discovered in his cell. The affidavits do nothing to advance Balsavich's cause. At best, they suggest that officials might have had a motive to falsely implicate Dykens. They do not establish retaliation as the "but for" cause of Balsavich's troubles. See Layne v. Vinzant, 657 F.2d 468, 475 (1st Cir. 1981).

ORDER

For the foregoing reasons, defendants' motion for summary judgment is ALLOWED.

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE